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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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WILLIAM BONEY,

Petitioner,

v.

GREGORY SMITH, et al.,

Respondents.

Case No. 3:15-cv-00193-MMD-WGC

ORDER

This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 comes before the Court on petitioner's motion for stay and abeyance (ECF No. 24). Respondents have opposed (ECF No. 25). Petitioner has not filed a reply, and the time for doing so has expired.

On February 21, 2017, the Court determined that this is a mixed petition containing both exhausted and unexhausted claims. As the Court cannot proceed on a mixed petition, it directed petitioner to select one of three options: (1) submit a sworn declaration voluntarily abandoning the unexhausted claims so as to proceed on only the exhausted claims; (2) return to state court to exhaust the unexhausted claims, in which case the petition would be denied without prejudice; or (3) file a motion to stay and abey the exhausted claims so petitioner could return to state court to exhaust his unexhausted claims.

On April 27, 2017, petitioner filed a motion for stay and abeyance.

1 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations  
2 upon the discretion of the court to facilitate habeas petitioners' return to state court to  
3 exhaust claims. The *Rhines* Court stated:

4 [S]tay and abeyance should be available only in limited circumstances.  
5 Because granting a stay effectively excuses a petitioner's failure to  
6 present his claims first to the state courts, stay and abeyance is only  
7 appropriate when the district court determines there was good cause for  
8 the petitioner's failure to exhaust his claims first in state court. Moreover,  
9 even if a petitioner had good cause for that failure, the district court would  
abuse its discretion if it were to grant him a stay when his unexhausted  
claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application  
for a writ of habeas corpus may be denied on the merits, notwithstanding  
the failure of the applicant to exhaust the remedies available in the courts  
of the State").

10 *Rhines*, 544 U.S. at 277. The Court went on to state that, "[I]t likely would be an abuse of  
11 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner  
12 had good cause for his failure to exhaust, his unexhausted claims are potentially  
13 meritorious, and there is no indication that the petitioner engaged in intentionally dilatory  
14 litigation tactics." *Id.* at 278

15 The Ninth Circuit has held that the application of an "extraordinary circumstances"  
16 standard does not comport with the "good cause" standard prescribed by *Rhines*. *Jackson*  
17 *v. Roe*, 425 F.3d 654, 661-62 (9<sup>th</sup> Cir. 2005). This Court has declined to prescribe the  
18 strictest possible standard for issuance of a stay. "[I]t would appear that good cause under  
19 *Rhines*, at least in this Circuit, should not be so strict a standard as to require a showing  
20 of some extreme and unusual event beyond the control of the defendant." *Riner v.*  
21 *Crawford*, 415 F. Supp. 2d 1207, 1210 (D. Nev. 2006). Thus, a petitioner's confusion over  
22 whether or not his petition would be timely filed constitutes good cause for the petitioner  
23 to file his unexhausted petition in federal court. See *id.* at 1210 (citing *Pace v.*  
24 *DiGuglielmo*, 544 U.S. 408, 416-17 (2005)).


25 Petitioner makes no effort in his motion to establish good cause for the failure to  
26 exhaust all his claims. The Court notes that petitioner was represented by counsel in his  
27 state postconviction proceedings and that he has not, in either his motion or his opposition  
28 to the motion to dismiss, asserted that postconviction counsel was ineffective for failing

1 to argue the unexhausted claims on appeal to the Nevada Supreme Court — much less  
2 provided a “concrete and reasonable excuse, supported by evidence.” *See Blake v.*  
3 *Baker*, 745 F.3d 977, 983 (9th Cir. 2014). Accordingly, as petitioner has failed to establish  
4 good cause, the motion for stay and abeyance must be denied.

5 It is therefore ordered that the petitioner’s motion for stay and abeyance (ECF NO.  
6 24) is hereby denied.

7 It is further ordered that petitioner will have thirty (30) days from the date of this  
8 order within which to submit a sworn declaration advising the Court either (1) that he is  
9 voluntarily abandoning his unexhausted claims and will proceed on the exhausted claims  
10 only or (2) that he will return to state court to exhaust his unexhausted claims, in which  
11 case this federal habeas petition will be denied without prejudice. If petitioner does not  
12 file an appropriate notice with the Court by this date, this action will be dismissed without  
13 prejudice and without further notice.

14 DATED THIS 15<sup>th</sup> day of December 2017.

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18 MIRANDA M. DU  
19 UNITED STATES DISTRICT JUDGE  
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